

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

McDONNELL DOUGLAS AIRCRAFT
D.B.A. THE BOEING COMPANY
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-488
Case Nos. T-98-00073
Through T-98-00487

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT
(Respondent)

Office of Appeals Nos. C-T-R-78020 (See Appendix)

The petitioner appealed from the corrected Order on Prehearing Motion of the administrative law judge which held that the petitioner was not entitled to notices of determination of training benefit extension eligibility or recomputations for numerous former employees listed in the appendix. The administrative law judge also held that the petitioner could not protest the chargeability of those increased benefits on the basis that the claimants were ineligible for them.

STATEMENT OF FACTS

The Employment Development Department (EDD) mailed a *Statement of Charges to Reserve Account* (DE 428T) (hereinafter, *Statement of Charges* or DE 428T) to the petitioner on October 17, 1994. This was the first notice the petitioner received that charges in excess of the amount shown on the *Notice of Wages Used for Unemployment (UI) Claim* (DE 1545) (hereinafter, *Notice of Wages Used* or DE 1545) had been made to its reserve account. The additional charges were made because numerous

claimants had applied for and received training benefits extensions under section 1271(a) of the Unemployment Insurance Code.¹ The petitioner requested an extension within which to file a protest to the charges and filed its protest on February 14, 1995.

EDD has not argued that the petitioner's protest was untimely filed.

The employer contends that its reserve account has been charged in excess of \$4.5 million dollars due to the training benefits extensions for the tax years 1994, 1995, and 1996. The instant matter pertains only to a charge of \$920,000 for the 1994 tax year.

The petitioner is the most recent employer as well as a base period employer of some claimants and a base period employer of others to whom extended training benefits were paid.

There was no evidence presented in this matter regarding the separations of the claimants whose receipt of training benefits extensions are at issue herein. The employer laid off large numbers of employees in a major reduction of its work force. Therefore, the claimants' eligibility for unemployment benefits under code section 1256 is not at issue here.

We take official notice under Section 5009(a), Title 22, California Code of Regulations, that the most recent employer will receive an employer response form, DE 1101C after a claimant applies for benefits. This form will indicate the claimant's reason for the separation and requests the employer to submit its reasons for the separation. Thereafter, EDD will calculate the claimant's weekly benefit amount and the claimant's maximum benefit amount. This information, along with a listing of the wages reported by the employer for the claimant, will be transmitted to the base period employer in the *Notice of Wages Used for Unemployment (UI) Claim*, the DE 1545, after the claimant receives the first weekly benefit payment. This form also establishes the percentage of benefits chargeable to the base period employer's reserve account.

¹ Unless otherwise specified the words "code section" will be used when referring to the California Unemployment Insurance Code.

REASONS FOR DECISION

The issue presented in this case is whether under code section 1034 a base period employer has a right to protest the merits of additional charges to its reserve account occasioned by an award of a training benefits extension where the only notice EDD gave the employer of such charges was in the employer's annual statement of charges.

The California Training Benefit (CTB) program allows claimants who lack competitive job skills to receive unemployment insurance benefits while attending approved training without regard to the requirements that a claimant remain available for work (code section 1253(c)), must search for work (code section 1253(e)), and must accept offers of suitable employment (code section 1257(b)) that otherwise apply to unemployment insurance recipients. The focus of the program is to assist the claimant in training for a demand occupation and thereby facilitate his return to full employment. In order to qualify for training benefits, the claimant must have a valid claim for unemployment benefits. Also, a claimant's eligibility for training benefits runs concurrently with eligibility for unemployment insurance benefits. Therefore, the computation of a claimant's regular benefit award, his weekly benefit amount multiplied by 26 weeks, will include training benefits the claimant may receive.

Section 1269(d) of the Unemployment Insurance Code provides, in part, that an individual may be eligible for training benefits if, (1) the person is unemployed and his or her job classification is impaired by a plant closure, advancement of technology, or by the effects of automation and relocation of the economy, and; (2) one of the substantial causes of the person's unemployment is a lack of sufficient current demand in the individual's labor market for the occupational skills for which the individual is fitted by training and experience.

Under code section 1271(a), a claimant may receive a training benefits extension for an additional 26 weeks beyond the initial 26 weeks of benefits. The main requirement for the extension, in addition to a valid unemployment insurance claim, is a timely application. A claimant's eligibility for the

training benefits extension is inextricably tied to his basic eligibility for unemployment benefits.

Section 1271(c) of the code specifically provides that additional benefits shall be "charged to individual employer reserve accounts consistent with other provisions of the code."

Section 1327 of the Unemployment Insurance Code requires the Department to give notice of the filing of a new or additional claim to the employer by whom the claimant was last employed immediately preceding the filing of the claim except in limited circumstances

The Department is required to promptly notify each of the claimant's base period employers of its computation of the claimant's benefits after the payment of the first weekly benefit. This includes the maximum amount of benefits potentially payable to the claimant during the benefit year (code section 1329).

This information is presently transmitted to the base period employer's via EDD's form DE 1545. The DE 1545 does not give the base period employer notice of the potential increase of the maximum benefit award should a training benefit extension be granted.

Under code section 1331, the base period employer may respond to the computation shown on the DE 1545 and provide information that may affect the claimant's eligibility. Further, should the base period employer question the claimant's eligibility, it is entitled to an EDD determination concerning the claimant's benefits that was made in light of the additional information provided by the employer.

The director of the Department is required to furnish every employer an annual statement showing credits and charges, the net balance of its reserve account, and its contribution rate (code section 1033). EDD currently provides this information on the statement of charges, or form DE 428T. Unless a written protest is filed within the time specified by law, the

contribution rate and other items shall become final (code section 1034).

An employer has the right to file a protest to any item shown on its yearly statement of charges. However, a protest based on a claimant's ineligibility for benefits is precluded if the employer was duly notified of the filing of the claim and did not contest the claimant's eligibility in due course after the receipt of such notice (code section 1034(a); Precedent Decision P-T-79). It is the petitioner's timely protest under code section 1034 that is the subject matter of this case. Through this protest, the petitioner wants to challenge the various claimants' eligibility for training benefits extensions. The administrative law judge held since the petitioner had not challenged the claimants eligibility to the additional benefits when it received its form DE 1545, it was now prevented from such a challenge under code section 1034(a).

It is undisputed that there is a statutory scheme in the code that requires notice and an opportunity for employers to respond and or challenge a claimant's eligibility for benefits when a new or additional claim is filed and any resulting potential charges that may be made to their reserve accounts during the benefit year.

The petitioner contends EDD had to give it notice under this statutory scheme of the claimant's request for a training benefit extension and the associated increased potential charges to its account. The petitioner argues that code section 1271(c) says charges to its reserve account for additional benefits provided under code section 1271(a) must be made "consistent with other provisions of the code" which require notice to the employer and an opportunity to respond to the claimant's eligibility for these extra benefits.

EDD's response to this contention by the petitioner is that the words "consistent with the other provisions of the code" do not require notice to the petitioner as alleged but rather is a defense to its position. The EDD maintains it only has a duty to provide notice of a claim for benefits under code sections 1327 to the most recent employer under code section 1256.3 when a new or additional claim is filed. EDD further argues a computation under code section 1329 of the potential charges to the base

period employer's account is only required when a new claim is filed.

Therefore EDD contends that since the request for a training benefits extension does not involve a new or additional claim it had no duty under the code to send the petitioner notice of the additional benefits granted under code section 1271(a) or the associated increased potential charges. We agree with EDD's argument in this regard. Without some challenge by the employer of the claimants' eligibility under code sections 1327 or 1329 EDD has no statutory or regulatory obligation to notify an employer that a claimant has applied for, will receive, or is receiving a training benefits extension.

The issue however is not whether the petitioner was entitled to notice that the claimant applied for, was granted or receiving such additional benefits. The question presented is whether the petitioner was entitled to notice of the potential charges for such additional benefits and an opportunity to timely challenge the claimant's eligibility for such benefits prior to the annual statement of charges (428T) being issued. The significance of this question is that if EDD had this duty to provide such notice and failed to do so the petitioner must be granted the right to question such eligibility in its protest under code section 1034 as though it was properly noticed in the first instance. The petitioner argues it was entitled to such notice and since it was not provided it can now protest both the accuracy of the charges and the claimants' eligibility for the additional benefits which resulted in the increased charges.

From our review of the notice requirements placed on EDD by the statutory scheme discussed above we have concluded that the plain meaning of the words in code section 1329 provides an answer to our inquiry in this case. Section 1329 requires EDD to provide notice of the "maximum amount of benefits potentially payable during the benefit year" (emphasis added). The word "potential" in our view is far reaching and all encompassing. It provides the due process safeguards against substantial increases in charges being made above those specified in EDD's DE 1545 without notice and time to respond, as took place in this case.

The employer may possess information regarding the claimant's work history, labor market, suitability for training, or other factors which may influence EDD's determination whether the claimant is qualified for training benefits under section 1269. Clearly under code section 1331 it is entitled to provide such information after timely notice of the potential for such benefit charges.

The DE 1545 sent to the petitioner only specified the benefits payable for 26 weeks and failed to include the potential for the additional 26 weeks of benefits. The employer first received notice of the increase in amounts charged to its account due to the training benefits extensions when it received the statement of charges on October 1994. Therefore since this is the first notice provided the petitioner of such charges it is entitled to protest them under code section 1034 as though they were provided as "potential" charges under code section 1329.

In our view, once EDD determines that a claimant is eligible for a training benefits extension and notifies the claimant of the number of weeks of benefits awarded, it makes a "silent" recomputation of the claimant's maximum benefit amount. The recomputation is "silent" in that EDD clearly recomputes the base period employer's charges once it has been determined that the claimant is eligible for extended training benefits, but this recomputation is never conveyed to the employer until the employer receives its Annual Statement of Charges (DE 428T).

Such a silent recomputation is not provided for in the Code nor in EDD's authorized regulations. We are not questioning the need for EDD to compute the increases, but only that there are no provisions allowing EDD to make a "silent recomputation." EDD again argues that it is not required to send a computation to the base period employer under code section 1329 unless a new claim is filed. The argument follows that since this did not happen it was merely conducting ministerial duties of updating its own data in computing the additional benefits and charges. We reject EDD's argument in this regard.

Section 1332(c) provides that EDD for good cause may reconsider a computation or recomputation and promptly notify

the claimant and any base period employer of the "recomputation."

EDD appears to have made good faith efforts to abide by the code and EDD regulations. We therefore conclude that the recomputation itself was legal under code section 1332(c) inasmuch as granting a training benefits extension provides EDD with good cause to reconsider its earlier computation and issue a new one. This would make EDD's actions legal in recomputing the benefits and charges in this case and it is only the failure to notice the petitioner of the recomputation that was improper under the code and regulations.

We also add that such a recomputation under code section 1332(c) would not have been necessary had the EDD given the petitioner a complete computation under code section 1329 as required by the code. If EDD had provided the claimant and petitioner such a complete computation then any communication to the claimant about the approval of additional benefits would have been ministerial in nature as EDD incorrectly argues took place in this case.

Due process requires not only that an employer be given notice of a proposed action and the opportunity to challenge or appeal EDD's actions. In order to be meaningful, notice and the right to protest must be given in a timely manner. Through lack of such notice, an employer may lose opportunities to take timely responsive action to protect its reserve account. Equity requires that an employer's opportunities at the time it is ultimately given notice and the right to protest are in all respects the true equivalents of those it would have had earlier had it received proper notice.

In Precedent Decision P-T-79, the Appeals Board found that in some circumstances it may be inequitable to charge an employer's reserve account even where benefits were lawfully paid to the claimant. In a situation where EDD improperly charged an employer's account, the employer can protest the charges based on EDD's improper action. In such a situation, Precedent Decision P-T-79 holds that the equitable remedy of estoppel may be applied to remedy EDD's invalid action. At this juncture in the case the proper relief is as specified above which is to allow the petitioner's protest under code

section 1034 on the merits of the granting of the additional benefits.

In the instant matter, the petitioner questions EDD's determination that the claimants were in fact eligible for training benefits extensions. It may well be that most employers will not have access to labor market information to rebut the information relied on by EDD in making its determinations. The employer will have to establish that there was not a substantial diminution in the labor market area in the claimants' occupational fields. However, it should be within the employer's discretion to decide after proper notice is given which charges to its reserve account it will protest.

We recognize the importance and fundamental due process right of employers to protect their reserve accounts. We also recognize the value of the extended benefits training program to claimants dedicated to improving their job skills. These interests are not incompatible and it is not our intent in this decision to in any way affect claimants' receipt of extended training benefits in a timely manner.

DECISION

The corrected Order on Prehearing Motion of the administrative law judge is affirmed in part and reversed in part. The petitioner is not entitled to notice of an application for or the granting of a training benefits extension. The employer is entitled to timely notice of the maximum amount of potential benefits payable, which amount includes training extension benefits. Where such notice is made only upon the employer's Statement of Charges (DE 428T), the employer is entitled to protest the merits of those charges to its reserve account resulting from the granting of training

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benefits extensions to the claimants and the increase in the claimants' maximum benefit amounts under code section 1034.

Sacramento, California, August 25, 1999.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

LOUIS M. BARNETT, Chairman

ROBERT P. MARTINEZ

RUBEN S. AYALA

RICHARD ALATORRE